Supreme Court, U.S.
FILED
JAN 18 199
JOSEPH F. SPANIOL
CLERK

No. 89-369 (2)

In The

Supreme Court of the United States

October Term, 1989

GENERAL MOTORS CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The First Circuit

BRIEF OF GOLDEN WEST REFINING COMPANY, ENVIRONMENTAL AUDIT, INC., AND SECURITY ENVIRONMENTAL SYSTEMS, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

LAWRENCE J. STRAW, JR.
(Counsel of Record)

KENNETH A. MANASTER
STRAW & GILMARTIN
A PROFESSIONAL LAW CORPORATION
100 Wilshire Boulevard, Suite 1325
Santa Monica, California 90401
Telephone: (213) 395-5577

Counsel for Amici Curiae
Golden West Refining Company,
Environmental Audit, Inc., and
Security Environmental Systems, Inc.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT..... 2

ARGUMENT

I THE CLEAN AIR ACT ESTABLISHES A FEDERAL – STATE PARTNERSHIP FOR THE PROTECTION OF OUR NATION'S AIR..... 3

A. CONGRESS GAVE THE STATES THE AUTHORITY TO MODIFY FEDERALLY APPROVED AIR POLLUTION CONTROL REGULATIONS OR PROVIDE TEMPORARY RELIEF FROM THEM 4

B. THE CLEAN AIR ACT IMPOSES A REQUIREMENT THAT EPA DECIDE IN A TIMELY FASHION TO APPROVE OR DISAPPROVE STATE – ISSUED SIP REVISIONS 6

II THE FAILURE OF EPA TO APPROVE OR DISAPPROVE DCOs AND SIP REVISIONS WITHIN THE STATUTORY TIME LIMITS INFRINGES UPON THE AUTHORITY OF THE STATES, LEAVES THE REGULATED COMMUNITY IN LIMBO, AND DEPRIVES THE PUBLIC OF AN OPPORTUNITY TO PARTICIPATE IN THE PROCESS 8

A. THE AUTHORITY OF THE STATES IS USURPED BY THE EPA'S FAILURE TO ACT WITHIN THE STATUTORILY DEFINED LIMIT 9

B. THE REGULATED COMMUNITY IS PLACED IN COMPLIANCE LIMBO 11

TABLE OF CONTENTS – Continued

Page

C. MEMBERS OF THE PUBLIC ARE DEPRIVED OF THEIR ABILITY TO PARTICIPATE IN THE PROCESS 16

III ONLY THE CASE LAW IN THE FIFTH CIRCUIT IS CONSISTENT WITH THE STATUTORY SCHEME OF THE ACT 17

A. THE RULE IN THE FIFTH CIRCUIT IS CONSISTENT WITH LEGISLATIVE INTENT 18

B. THE RULES IN THE D.C., FIRST AND SIXTH CIRCUITS ARE BASED UPON ERRONEOUS ASSUMPTIONS 20

1. *The approach of the First and Sixth Circuits ignores the practicalities of air pollution control compliance under the Congressional scheme* 26

2. *The practical results of the approaches taken by the various circuits can be clearly contrasted* 27

IV. CONCLUSION 28

TABLE OF AUTHORITIES

Page

CASES

American Cyanamid v. U.S. Environmental Protection Agency, 810 F.2d 493 (5th Cir. 1987) 7, 19

Bethlehem Steel Corporation v. Gorsuch, 742 F.2d 1028 (7th Cir. 1984) 7, 12, 16

Bethlehem Steel Corporation v. United States Environmental Protection Agency, 638 F.2d 994 (7th Cir. 1980) 7, 17

Council of Commuter Organizations v. Gorsuch, 683 F.2d 648 (2d Cir. 1982) 7, 17

Council of Commuter Organizations v. Thomas, 799 F.2d 879 (2d Cir. 1986) 7, 14, 17, 18

Duquesne Light Company v. Environmental Protection Agency, 698 F.2d 456 (D.C. Cir. 1983) 7, 8, 14, 18, 21

General Motors Corp. v. Environmental Protection Agency, 871 F.2d 495 (5th Cir. 1989) .. 7, 13, 19, 20, 21

Hallstrom v. Tillamook County, ___ U.S. ___, 110 S.Ct. 304 (1989) 9, 10, 28

Train v. Natural Resources Defense Council, Inc., 421 U.S. 60 (1975) 4, 10, 22

Union Electric Company v. Environmental Protection Agency, 427 U.S. 246 (1976) 3, 4, 22

United States v. Alcan Foil Products, 889 F.2d 1513 (6th Cir. 1989) 7, 8, 14, 20, 21, 23

United States v. General Motors Corporation, 876 F.2d 1060 (1st Cir. 1989) 7, 20, 22

TABLE OF AUTHORITIES – Continued

Page

United States v. Mobil Oil Corporation, pending in U.S. District Court, Eastern District of California, No. 87-0627 LKK..... 11

United States v. National Steel Corp., 767 F.2d 1176 (6th Cir. 1985)..... 7

FEDERAL STATUTES

Clean Air Act

42 U.S.C. § 7401(a)(3)..... 3

§ 7401 *et seq.*..... 3

§ 7407(a)..... 3, 24

§ 7410..... 5, 19

§ 7410(a)(1)..... 16

§ 7410(a)(2)..... 4, 6, 9

§ 7410(a)(2)(A)-(K)..... 4, 5

§ 7410(a)(3)(A)..... 4, 5, 6, 9, 16

§ 7410(g)(1)..... 6, 9

§ 7413..... 5, 6, 19, 26

§ 7413(a)(1)..... 25

§ 7413(b)..... 25

§ 7413(d)..... 5, 19

§ 7413(d)(1)(A)..... 16

§ 7413(d)(2)..... 5, 6, 9, 17

§ 7420..... 18, 19, 26

§ 7602(j)..... 6

TABLE OF AUTHORITIES – Continued

Page

§ 7604..... 24

§ 7604(a)..... 14

§ 7604(a)(2)..... 14, 18

§ 7607(b)(1)..... 16

Act of December 17, 1963, Pub. L. No. 88-206, § 1, 77 Stat. 392..... 3

CALIFORNIA STATUTES

Cal. Health & Safety Code § 39602..... 24

§ 40702..... 23

§§ 41650-41652..... 24

§ 41650(a)..... 23

§ 42400..... 24

§§ 42400.1-42403..... 24

REGULATIONS

40 C.F.R. § 51.100..... 5

§ 51.104..... 5

§ 51.105..... 5

§ 65.03(a)(1)..... 5

§ 66.3..... 18

§ 66.3(c)(1)..... 18

TABLE OF AUTHORITIES – Continued

Page

LEGISLATIVE MATERIAL

H.R. Rep. No. 95-294, 95th Cong., 1st Sess. (1977) *reprinted in* 1977 U.S. Code Cong. & Ad. News 1077 5

TREATISES

Selmi and Manaster, *State Environmental Law*, § 6.02[1][b] at 6-7 (1989).....5, 26

Novick *et al.*, *Law of Environmental Protection*, § 6.01 at 6-3, 6-4 (1987)..... 23

MISCELLANEOUS

50 Fed. Reg. 36732-36733 (1985)..... 7

Marvin Durning, Assistant Administrator for Enforcement, to Regional Administrators and Regional Enforcement Directors, "Enforcement Under Clean Air Act Amendments – Orders under Section 113(a) and 113(b)", July 27, 1978 13

"Source Specific SIP Revisions", July 29, 1983 21

"Clean Air Act Stationary Source Civil Penalty Policy," September 12, 1984..... 25

"Settlement of Noncompliance Penalties Under Section 120 of The Clean Air Act," October 30, 1980, and April 2, 1981..... 25

Dante, *The Divine Comedy: Hell*, Canto IV 11, 12

With consent of the parties, Golden West Refining Company, Environmental Audit, Inc., and Security Environmental Systems, Inc. submit this *amicus curiae* brief in support of the Petitioner.

STATEMENT OF INTEREST

Golden West Refining Company, Environmental Audit, Inc., and Security Environmental Systems, Inc. submit this *amicus curiae* brief in support of appellant General Motors Corporation.[1]

Golden West Refining Company ("Golden West"), a California corporation, is engaged in the refining of petroleum and the distribution of refined petroleum products. Golden West operates a 45,000 barrel per day refinery in Santa Fe Springs, California.

Security Environmental Systems, Inc. ("SES") is a Delaware corporation engaged in the business of incinerating classified documents and biohazardous wastes. SES is currently engaged in the process of securing permits for and constructing a hazardous waste incineration facility in Vernon, California.

Environmental Audit, Inc. ("EAI") is a California corporation which provides environmentally related consulting services to clients located throughout the United States. These services include assisting in the permitting of facilities and identification of technologies for compliance with applicable air pollution control regulations.

Amici Golden West and SES operate facilities which are subject to numerous local, state, and federal air pollution control regulations. *Amicus* EAI attempts to assist sources to comply with local, state and federal air pollution control regulations. They therefore have a stake in the outcome of this litigation.

---

[1] This brief is filed with the written consent of the parties, pursuant to Supreme Court Rule 37.3. Letters of consent are on file with the Clerk of the Court.

In the context of the issues at bench, the interests of *amici* coincide with the interest of General Motors and with the public interest in this matter. *Amici* often find themselves struggling to determine the appropriate method of compliance with air pollution control regulations in the face of conflicting federal and state requirements.

SUMMARY OF ARGUMENT

The Clean Air Act acknowledges the primary role of the States in developing and enforcing air pollution control laws within their individual borders. The federal government was given the responsibility for developing clean air goals and overseeing the States' attempts to reach these goals. One of the more significant vehicles created by Congress for achieving these goals was the State Implementation Plan ("SIP").

The States were to determine the strategies for achieving the clean air goals, choosing the approaches which best suited the particular circumstances within their borders and incorporating these strategies into a SIP. The States were also authorized by Congress to revise these plans as warranted by changing circumstances and to provide individual air pollution sources temporary relief from the mandates of the plans under limited circumstances. These revisions have independent authority under State law, apart from their role within the framework of the Clean Air Act. If the States' plans and revisions thereto met the requirements of the Act, Administrator of the Environmental Protection Agency ("EPA") was required to approve them.

EPA has unashamedly failed to approve or disapprove revisions within the deadlines mandated by Congress. At the same time, EPA seeks to penalize sources attempting in good faith to comply in a timely fashion with the requirements of the States' revisions. The EPA's lack of timeliness has undercut the designated and proper role of the States in developing and enforcing clean air laws within their borders. The EPA's actions seeking to penalize sources for not complying with old SIP requirements while revisions are pending places the

regulated community in a quandary as to the appropriate method of compliance.

The Clean Air Act does not delineate consequences for EPA's failure to timely complete its review of SIP revisions adopted by the States. The various Circuit Courts of Appeals have attempted to fashion a solution and, in so doing, they have come to conflicting conclusions. The remedy adopted by the Fifth Circuit, for dealing with EPA attempts to enforce SIP provisions while EPA review of revised provisions is past due, is the response which most closely reflects the intent of Congress. That remedy bars EPA enforcement against a source not complying with an old SIP provision until EPA has acted to disapprove a revised SIP provision.

ARGUMENT

I.

THE CLEAN AIR ACT ESTABLISHES A FEDERAL – STATE PARTNERSHIP FOR THE PROTECTION OF OUR NATION'S AIR

The proper role of the States in controlling air pollution within their respective borders was delineated by Congress in §§ 7401(a)(3) and 7407(a) of the Clean Air Act, 42 U.S.C. § 7401, *et seq*. Section 7401(a)(3) provides, in relevant part: "[t]hat the prevention and control of air pollution at its source is the *primary* responsibility of the States and local government. . . ."[2] [Emphasis added]. In determining the nature of emission limitations to be imposed within its borders, a State is free to select whatever controls it deems best suited for that State's particular needs. Industries with technological problems or particular economic concerns may seek special treatment in the plan in order to take these concerns into account. *Union Electric Company v. Environmental Protection Agency*, 427 U.S. 246, 266 (1976). The *only* limitation on a State's selection of controls is that they must comply with the criteria

---

[2] This primary responsibility imposed upon the States predated the Clean Air Act of 1970. *See* Act of December 17, 1963, Pub. L. No. 88-206, § 1, 77 Stat. 392.

set forth in § 7410(a)(2)(A)-(K). "The Act gives the agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of § 110(a)(2) [§ 7410(a)(2)]." *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 79 (1975).

While the States were given the primary responsibility for assuring air quality within their borders by developing and enforcing the SIPs, the federal government was given the responsibility of assuring that the SIPs met the requirements of the Clean Air Act. If the SIPs met these delineated requirements, the Administrator was required to approve them. *Union Electric*, 427 U.S. at 257. The Act required that this process of determining whether the initial SIPs met these enumerated requirements be accomplished within four months. 42 U.S.C. § 7410(a)(2). "No one can doubt that Congress imposed upon the Agency [EPA] and States a comprehensive planning task of the first magnitude which was to be accomplished in a relatively short time." *Train*, 421 U.S. at 68. The imposition of this "short time" SIP review process accomplished two objectives: it got the overall federal-state effort off to a fast start, and it minimized the time during which state air quality requirements would have binding force under state law but would not yet have the force of federal law.

A. CONGRESS GAVE THE STATES THE AUTHORITY TO MODIFY FEDERALLY APPROVED AIR POLLUTION CONTROL REGULATIONS OR PROVIDE TEMPORARY RELIEF FROM THEM.

In recognition of changes in technology, air pollution levels, economic circumstances, or other unforeseen factors within a State's borders, as well as a State's desire to accommodate the legitimate needs of a source or an industry operating at variance from an approved SIP, Congress provided that the plans can be revised by the State if the revisions meet the same standards required of original plans. *See* 42 U.S.C. § 7410(a)(3)(A). *Union Electric*, 427 U.S. at 267 n. 16. "Essentially a SIP is a constantly evolving conglomeration of

substantive and procedural regulations applicable to categories of air pollution sources, and supplemented by specific compliance schedules governing individual sources which are not meeting the regulations' terms." Selmi and Manaster, *State Environmental Law*, § 6.02[1][b] at 6-7 (1989).

Where a SIP revision is developed by a State, it is subject to the criteria listed in § 7410(a)(2)(A)-(K), the requirements of § 7410(a)(3)(A) and 40 C.F.R. §§ 51.100, 51.104 and 51.105. These requirements include the State's obligation to provide notice and public hearings upon the proposed SIP revision before it may be adopted by the State. If the SIP revision meets all the above-enumerated requirements, the Administrator is required to approve it. 42 U.S.C. § 7410(a)(3)(A).

Additionally, the 1977 amendments to the Clean Air Act added subsection 113(d) (42 U.S.C. § 7413(d)) providing for the States' issuance of delayed compliance orders ("DCOs"), a form of temporary relief from the requirements of a SIP, in order to affirm the role of the States as the primary authority for enforcement of SIPs. *See* H.R. Rep. No. 95-294, 95th Cong., 1st Sess. (1977), *reprinted in* 1977 U.S. Code Cong. & Ad. News 1077, 1135-1136. The Administrator is required to approve a DCO if he determines it does not violate the requisites of the Act. 42 U.S.C. § 7413(d)(2). When approved by the Administrator, a DCO becomes part of the State's SIP. 40 C.F.R. § 65.03(a)(1).

The case pending before the Court addresses the appropriate remedy for the Administrator's failure to approve or disapprove a proposed SIP revision under § 7410 of the Act within the statutory four month limit. There are numerous other cases where the EPA has similarly failed to act upon proposed SIP provisions arising from DCOs issued under § 7413 of the Act within the 90 days mandated by the Act. This widespread pattern of EPA's disregard of its obligations to timely act upon all forms of state-granted relief, as provided for in the Clean Air Act, has resulted in many enforcement actions being initiated by the EPA against sources attempting to comply with the directives of state-issued SIP revisions and DCOs prior to EPA's determination of their

approvability. *Amici* believe the Court should be cognizant of this parallel concern involving proposed SIP provisions initiated as DCOs issued under § 7413 because the Court's decision in this case will likely be viewed by the lower courts as also influencing the outcome of enforcement actions initiated during the pendency of the DCO approval/disapproval process.

B. THE CLEAN AIR ACT IMPOSES A REQUIREMENT THAT EPA DECIDE IN A TIMELY FASHION TO APPROVE OR DISAPPROVE STATE – ISSUED SIP REVISIONS.

Consistent with its goal of assuring that progress did not fall victim to bureaucratic delay, Congress provided short deadlines for federal approval or disapproval of state-granted relief from SIP requirements. Under the terms of 42 U.S.C. § 7413(d)(2), a DCO for a "minor" source became immediately effective upon issuance by a State and only ceased to be effective upon express disapproval by the Administrator. The Administrator was only given 90 days to approve or disapprove a state-issued DCO for a "major" source.[3]

While the Clean Air Act does not separately state the time within which the Administrator must approve or disapprove a SIP revision, the Act does require approval or disapproval of an original SIP submitted by a State within 120 days of the Administrator's receipt of the State's plan. 42 U.S.C. § 7410(a)(2). Section 7410(a)(3)(A), dealing with revisions to SIPs, incorporates all the requirements of § 7410(a)(2). It must therefore be presumed that the 120-day deadline for acting, expressly contained in § 7410(a)(2), is also incorporated therein. Further evidence of Congressional intent is found at § 7410(g)(1), which discusses circumstances where

[3] A "major stationary source" is a stationary facility which emits or has the potential to emit 100 tons per year or more of any air pollutant. A "minor stationary source" emits or has the potential to emit less than this amount. 42 U.S.C. § 7602(j).

the Administrator has not acted on a SIP revision "within the required four month period."[4]

The weight of case law holds that the four month deadline for the Administrator to approve or disapprove original SIP submissions applies to SIP revisions as well. Every court that has expressly dealt with the issue has so held.[5] *See Duquesne Light Company v. Environmental Protection Agency*, 698 F.2d 456, 471 (D.C. Cir. 1983); *Council of Commuter Organizations ("CCO") v. Gorsuch*, 683 F.2d 648, 651 n. 2 (2d Cir. 1982); *Council of Commuter Organizations ("CCO") v. Thomas*, 799 F.2d 879, 888 (2d Cir. 1986); *American Cyanamid v. U.S. Environmental Protection Agency*, 810 F.2d 493, 495 (5th Cir. 1987); *United States v. General Motors Corporation*, 876 F.2d 1060, 1066 (1st Cir. 1989); and *United States v. Alcan Foil Products*, 889 F.2d 1513 (6th Cir. 1989).

Despite the legal mandate that EPA act in a timely fashion to approve or disapprove SIP revisions and DCOs, the actual practice of EPA is not in accordance with this mandate. Reported decisions demonstrate EPA's repeated and consistent failure to adhere to this statutory mandate of timeliness. *See, e.g., Bethlehem Steel Corporation v. United States Environmental Protection Agency*, 638 F.2d 994 (7th Cir. 1980); *CCO v. Gorsuch*, 683 F.2d 648; *United States v. National Steel Corporation*, 767 F.2d 1176 (6th Cir. 1985); *Bethlehem Steel Corporation v. Gorsuch*, 742 F.2d 1028 (7th Cir. 1984); *CCO v. Thomas*, 799 F.2d 879; *American Cyanamid*, 810 F.2d 493; *General Motors Corp. v. Environmental Protection Agency*, 871 F.2d 495 (5th Cir. 1989); *United States v. General*

[4] In a Federal Register notice relating to proposed regulations dealing with noncompliance penalties pursuant to § 120 of the Act, EPA acknowledged the four month limit applied to SIP revisions. 50 Fed. Reg. 36732 *et seq.* at 36733 (Sept. 9, 1985).

[5] The Sixth Circuit once suggested by way of dictum in a footnote that the four-month rule did not apply to SIP revisions. *United States v. National Steel Corp.*, 767 F.2d 1176, 1182-1183 n. 1 (6th Cir. 1985). That court later expressly rejected this suggestion and held the four-month rule did apply to SIP revisions. *U.S. v. Alcan Foil Products, infra.*

Motors, 876 F.2d 1060; and *United States v. Alcan Foil Products*, 889 F.2d 1513. *Cf., Duquesne Light v. EPA*, 698 F.2d 456. The foregoing list could surely be supplemented by unreported district court decisions and by federal enforcement actions resolved prior to or during litigation. It can be readily assumed that both large and small business entities have succumbed to the threat of such federal enforcement measures. Rather than absorb the substantial cost burden of challenging EPA's disregard of the statutory timetable, they have settled with EPA and paid monetary penalties. The clear message is that EPA has seldom, if ever, approved or disapproved a DCO or SIP revision within the 90 or 120 days mandated by Congress.

II.

THE FAILURE OF EPA TO APPROVE OR DISAPPROVE DCOs AND SIP REVISIONS WITHIN THE STATUTORY TIME LIMITS INFRINGES UPON THE AUTHORITY OF THE STATES, LEAVES THE REGULATED COMMUNITY IN LIMBO, AND DEPRIVES THE PUBLIC OF AN OPPORTUNITY TO PARTICIPATE IN THE PROCESS

Businesses have relied in good faith upon the primary authority of the States to grant relief from SIP requirements. Consistent with State law, they have operated their facilities in accordance with the DCOs or SIP revisions, even before a final EPA decision has been made upon the state-granted relief. However, it may take years, if ever, to obtain a final EPA decision on SIP revisions or DCOs. It often appears as if the EPA is a "black hole" for the submission of SIP revisions and DCOs.[6] EPA has initiated considerable litigation, including the case at bench, against these good faith attempts to comply with the mandates of state government while awaiting EPA decisions.

---

[6] A "black hole" is a dense, stellar body from which no light emerges.

If EPA can take forever, and still keep the source in jeopardy of penalties for the entire, unpredictable period, all certainty and fairness of the Congressionally crafted DCO-SIP revision process are destroyed. The regulated source is stymied in its effort to know what the law expects of it. The State's primary role under the Clean Air Act becomes a charade. Whether by virtue of being an overworked bureaucracy or an overzealous claimant of the prerogatives of prosecutorial discretion, the EPA in this posture asserts its power as an obstacle to the State's implementation and enforcement of the Act.

A. THE AUTHORITY OF THE STATES IS USURPED BY THE EPA'S FAILURE TO ACT WITHIN THE STATUTORILY DEFINED TIME LIMIT.

Providing for both SIP revisions and DCOs to be issued by the States, Congress required they be approved by the Administrator expeditiously: 120 days for a SIP revision; 90 days for a DCO. 42 U.S.C. §§ 7410(a)(2), (a)(3)(A) and (g)(1), 7413(d)(2). Unless EPA honors these time limits, the States are effectively prevented from real-time response to changing economic, technological, or pollution circumstances. While considerable state resources may be expended in seeking accommodation to changing circumstances through negotiation and preparation of SIP revisions and DCOs, the conduct of public hearings thereon, and their submission to EPA, these efforts are rendered useless if EPA fails to act as mandated.

A central aspect of the allocation of power in the Clean Air Act is the pivotal role of the States in implementing and enforcing the Act's pollution standards. As this Court recently confirmed in *Hallstrom v. Tillamook County*, ___U.S. ___, 110 S.Ct. 304 (1989), a private citizen cannot initiate an enforcement suit under federal environmental statutes such as the Resource Conservation and Recovery Act ("RCRA") or the Clean Air Act until, after proper statutory notice, government prosecutors have had an opportunity to act first against the alleged violator. Citizen enforcement, in short, is supplementary or secondary to government enforcement. The present

case requires a similar but further refinement: federal enforcement under the Clean Air Act is secondary to state enforcement.

> The Agency [EPA] is plainly charged by the Act with the responsibility for setting the national ambient air standards. Just as plainly, however, it is relegated by the Act to a *secondary* role in the process of determining and *enforcing* the specific source-by-source emission limitations which are necessary if the national standards it has set are to be met.

Train, 421 U.S. at 79 [Emphases added].

As a private suit cannot be brought until the government, including the State, has had a full opportunity to give effect to its choice of enforcement approach, so too the federal government should be prevented from prosecuting an enforcement case until the State has had a full opportunity to give effect to its choice of enforcement approach. This Court gave full effect to the RCRA statutory scheme in *Hallstrom*. So too should the Court give full effect to the Clean Air Act's assignment of power to the States in the first instance by eliminating federal enforcement powers until the State's preferred scheme for regulation of the source has been accorded the definitive treatment by EPA prescribed by the Act. In this case, as in *Hallstrom*, the proper approach should be a strict one: the enforcement plaintiff assigned a secondary role under the statutory scheme (*i.e.*, the private citizen in *Hallstrom* and the federal government in this case) cannot proceed unless and until the entity assigned the primary enforcement role (*i.e.*, the State under the Clean Air Act) has been provided the statutorily envisioned opportunity for its enforcement strategy to take effect.

EPA's failure to determine the approvability of SIP revisions and DCOs within the allotted time actually constitutes a "pocket veto" of the States' proposals. It impairs the ability of the States to achieve the National Ambient Air Quality Standards by the means they determine are preferable and practical. It deprives the States of the opportunity to timely explore alternative methods of regulation. It also creates a

vast national reservoir of businesses at risk of prosecution for non-compliance with "old" SIP provisions while complying with the States' "new" SIP provisions.[7] The reported cases are but the tip of the iceberg as to the number of sources at risk. Should this Court condone EPA's conscious disregard of its statutory deadlines, EPA would thereby be encouraged to bring even more enforcement actions against sources complying, in good faith, with State directives.

B. THE REGULATED COMMUNITY IS PLACED IN COMPLIANCE LIMBO.

The failure of the EPA to adhere to statutorily mandated deadlines for approval or disapproval of SIP revisions not only intrudes upon the primary role of the States, but also places members of the regulated community in compliance limbo.[8] The procedure urged by the EPA, in this web of

---

[7] It may be in the economic interest of certain divisions within EPA to maintain a pool of technically non-complying businesses. For instance, in EPA Region IX, the resources allotted to the Compliance Section and the Regional Counsel's Office are in proportion to the number of cases referred for prosecution. That is, they have an annual minimum number of cases which they are required to initiate in order to maintain their personnel, travel and training funds. *See* Declaration of Allan Zabel, EPA Region IX Assistant Regional Counsel (Oct. 29, 1987), at ¶¶5 and 6 filed in *United States v. Mobil Oil Corporation*, pending in U.S. District Court, Eastern District of California, Case #87-0627 LKK.

[8] In *The Divine Comedy*, Dante asked his guide upon approaching the First Circle – Limbo, why the souls within that ring were tormented. The response seems an apt description of those awaiting EPA action on SIP revisions and DCOs.

> They sinned not; yet their merit lacked its chiefest
> Fulfillment, lacking baptism, which is
> The gateway to the faith which thou believest;
>
> Or, living before Christendom, their knees
> Paid not aright those attributes that belong
> To God; and I myself am one of these.

(Continued on following page)

litigation involving EPA power during the period a DCO or SIP revision is being "considered", leaves members of the regulated community confronted with a brutal choice: (1) shut down operations in order to cease "offending" air emissions until EPA renders a decision, however long that may take; (2) comply with the state-approved plan but operate in violation of the existing SIP; (3) attempt to comply with the existing SIP but violate the state-approved plan; or (4) initiate a suit seeking to mandate EPA action.

None of these four alternatives makes sense. Given that EPA's failure to act on State SIP revisions may exceed ten years, as noted in *Bethlehem Steel v. Gorsuch*, 742 F.2d at 1035, the first alternative, shutting down a facility to await action by the EPA, would likely constitute economic suicide for a business.

The second response, operation in compliance with a State's "new" SIP revision and in violation of the "old" federally-approved SIP provision, is no more attractive given EPA's enforcement posture as demonstrated in the cases, including that at bench. The current civil penalty for violation of a SIP is up to $25,000 per day, and criminal penalties may also be sought. A business operating under these circumstances is in an awkward position and is acutely vulnerable. It usually has gone to the state regulatory authority and *admitted* it is not in compliance or cannot come into compliance with the existing SIP provision. It has either requested a change in the SIP or a delay in compliance with the SIP. If the State grants relief, after the required notice and public hearing, the source then must publicly embark on a program to adhere to the terms of the state-granted relief. Thereafter, the State provides EPA with notice of this situation when it seeks approval of the SIP revision or DCO. Hence, a source

---

(Continued from previous page)

For such defects alone – no other wrong –
We are lost; yet only by this grief offended:
That, without hope, we ever live, and long.

Dante, *The Divine Comedy: Hell*, Canto IV at lines 34-42.

honestly seeking relief has of necessity placed itself in a position of peril.[9]

As suggested by the factual context of the case at bench, if a source chooses the second alternative and ignores the old SIP requirements and acts to meet the mandate of a new SIP revision or DCO, it faces the specter of massive civil penalties or the possibility of criminal prosecution if the SIP revision or DCO is eventually disapproved. In the case of General Motors, however, EPA did not even wait to disapprove the proposed SIP before seeking penalties.

The third alternative set out above is no more reasonable. Initially, it must be noted that if the source could readily comply with the old SIP requirement, it would not be seeking relief. Hence, this "alternative" may be illusory. But even if it were possible to comply with the existing SIP while awaiting EPA's determination on the relief granted by the State, the source would most likely subject itself to penalties for violation of state law. When a SIP revision or a DCO is approved by the State, it becomes enforceable under state law. A source failing to comply with its terms could, therefore, be prosecuted. Indeed, this circumstance is encouraged by the EPA. It has urged the States to prosecute sources for non-compliance with the terms of DCOs during the period when EPA approval is pending.[10]

If the source complies with the old SIP, assuming it can do so, and ignores the requirements of the SIP revision or

---

[9] EPA's approach may actually create disincentives to honor the regulatory scheme. A source may be tempted to engage in "self-help", deliberately ignoring the statutory scheme for obtaining relief, so as to be at less risk of prosecution than a source calling attention to itself by seeking a SIP revision or a DCO.

[10] *See* Memorandum from Marvin Durning, Assistant Administrator for Enforcement, to Regional Administrators and Regional Enforcement Directors, "Enforcement Under Clean Air Act Amendments – Orders under Section 113(a) and 113(b)", July 27, 1978, at p.10, *reprinted in* Government Institutes, Inc., EPA Clean Air Act Compliance/Enforcement Guidance Manual, at 428 (1985). This memorandum was addressed on this point in *General Motors v. EPA*, 871 F.2d at 501.

DCO, not only is it subject to prosecution by the State for noncompliance with the new SIP, but if the SIP revision or DCO is later approved by the Administrator, the source can find itself immediately in retroactive violation of the SIP revision which likely required completion of some act at a prior time.

The final alternative, initiation of an action seeking mandate of a decision upon the state-generated relief, is also ineffective. It was the Second Circuit's recommended response to the Administrator's tardy review of a New York SIP revision proposal. *CCO v. Thomas*, 799 F.2d at 888. Such action would necessarily be initiated under 42 U.S.C. § 7604(a)(2). This section provides an action may be brought against the Administrator where he has failed to perform a non-discretionary duty. At the outset, it must be noted the action may not be commenced until the Administrator has been afforded 60 days' notice of his alleged dereliction of duty. This notice, in turn, cannot be provided until the statutory period within which he may act (i.e., 90 days for a DCO or 120 days for a SIP revision) has run. Then and only then may an action be initiated. Thus, by the time suit may be filed, a source is already "at risk" at least 50% longer than mandated by Congress.[11]

Thus, the practical consequences of EPA procrastination are significant no matter which strategy a source adopts. A

---

[11] The pace and vagaries of litigation can only further extend this period of risk. Of particular note, as referenced in the recent Sixth Circuit decision, an action under § 7604(a)(2) was initiated by the Jefferson County (Kentucky) Air Pollution Control District in an attempt to force a timely decision on a SIP revision proposal. The source which was the subject of the proposed revision nevertheless became the subject of an EPA enforcement action. The court in that case observed, "[t]he alternative remedy of suit under Section 304(a) [42 U.S.C. § 7604(a)] to compel EPA to rule is not very effective. . . . The final ruling on the proposed revision came well over two years after the section 304(a) suit was filed." *United States v. Alcan Foil Products*, 889 F.2d at ___. The ineffectiveness of such a suit as a safeguard to EPA inaction was also noted by the D.C. Circuit. *Duquesne Light*, 698 F.2d at 472.

source may choose economic ruination or alternatively may risk the possibility of substantial civil or criminal penalties either at the hands of the federal government if it abides by the State's new SIP requirements, or at the hands of the State if it ignores the new State requirements and adheres to the old SIP. Certainly Congress did not intend to create such a quandary. Clearly the question of constitutional guarantees of due process and equal protection is raised by such a dilemma.

In crafting the provisions of the Clean Air Act, Congress recognized there would be time required to accommodate the federal government's review of a proposed SIP revision or DCO. For this reason, the authors of the Act provided 90 or 120 days for the Administrator to conduct his review and issue his decision. This short time frame was allotted for the Administrator's decision-making process so as to place a finite limit on a source's exposure to fines or penalties during the Administrator's review.

Admittedly, regulated sources are inescapably in a delicate position for these brief statutory periods, operating in jeopardy of enforcement penalties from one level of government or the other. But the limited time period of such jeopardy chosen by Congress can be dealt with, as a practical matter, by both the source and the State authorities. Both can know that the approval or disapproval from the federal government will be forthcoming by a date certain. Private investment and pollution control planning, and state government enforcement initiatives, can proceed on sensible, predictable schedules. Absent such a limitation on exposure to penalties, sources are in the dark, not knowing for certain, possibly for years, what is required by way of compliance.

Delay in rendering a decision will often place a source in the position of being unable to avoid penalties. The instant case is a clear example of such a situation. The Agency's disapproval decision on Massachusetts' proposed SIP revision was not finalized until two years and nine months after it was submitted to EPA by the Commonwealth. Since General Motors' act of compliance with the new, revised SIP (and in

contravention of the old SIP) was by then complete, there was no way General Motors could change its operations to avoid the attempted imposition of penalties.

C. MEMBERS OF THE PUBLIC ARE DEPRIVED OF THEIR ABILITY TO PARTICIPATE IN THE PROCESS.

The Clean Air Act, in addition to providing for a federal-state partnership in air pollution control, mandates that substantial participation by the citizens of the country be possible. Congressional desire for public participation is manifest in the sections of the Act dealing both with SIPs and with DCOs.[12] An action to challenge the Administrator's approval must be initiated in the appropriate U.S. Circuit Court of Appeals within 60 days of publication.[13] 42 U.S.C. § 7607(b)(1).

The Act's invitation to the public to participate in the process is effectively withdrawn by Agency inaction. The case at bench is a clear example. There is no suggestion that the Commonwealth shirked its duty to provide notice and public hearing on the proposed revision. Presumably, resultant public comment was considered by Massachusetts prior to its determination to revise the SIP. The Administrator's final decision on the Commonwealth's proposed SIP revision did not occur until after the facility which was the subject of that proposal had ceased operation. If the Administrator had approved the revision, it would have been too late for any citizen to challenge that result.

---

[12] *E.g.*, § 7410(a)(1) provides for original state SIP submissions "[a]fter reasonable notice and public hearings"; § 7410(a)(3)(A), dealing with state SIP revisions, incorporates "reasonable notice and public hearings"; and § 7413(d)(1)(A) provides for public notice and opportunity for public hearing prior to a state's adoption of a DCO. Additionally, the EPA's consideration of SIP revisions or DCOs is published in the Federal Register for public comment.

[13] An action to challenge the disapproval of a DCO may also be possible under the authority of § 7607(b)(1). *Bethlehem Steel v. Gorsuch*, 742 F.2d at 1032.

III.

ONLY THE CASE LAW IN THE FIFTH CIRCUIT IS CONSISTENT WITH THE STATUTORY SCHEME OF THE ACT

The Circuit Courts of Appeals which have articulated responses to EPA's avoidance of its statutory mandate to timely act upon proposed SIP revisions and DCOs have provided a variety of approaches. The Seventh Circuit first commented on the failure of EPA to comply with time deadlines in the Act. In *Bethlehem Steel Corporation v. United States Environmental Protection Agency*, 638 F.2d 994 (7th Cir. 1980), the court considered the EPA's failure to determine the approvability of a DCO within the 90 day period prescribed by § 7413(d)(2). Woven into the facts of the case were allegations that EPA personnel improperly commingled adjudicative and prosecutorial functions and arrived at their decision to disapprove the DCO in order to enhance EPA's prosecutorial position in an ongoing enforcement action.

The *Bethlehem* court chastised EPA for its failure to adhere to the mandate to decide DCOs within 90 days of their submittal. The court dismissed EPA's claim that it had an indefinite time to reach a final determination on a DCO so long as *some* "predisposition" was issued within 90 days. In a footnote, the court stated its belief that the filing of a civil enforcement action prior to the issuance of a disapproval of the DCO "[w]ould open up many questions concerning the continued viability of the action. . . ." *Bethlehem Steel*, 638 F.2d at 1002-1003 n. 9.

In the wake of *Bethlehem Steel*, the Second Circuit was called upon in a pair of related cases to review SIP revisions for the New York City area. *See CCO v. Gorsuch*, 683 F.2d 648; *CCO v. Thomas*, 799 F.2d 879. In both cases, EPA failed to act upon proposed SIP revisions within the four months allotted.

Despite being taken to task by the court in *CCO v. Gorsuch*, 683 F.2d at 661 for its delay, when it came time to review a subsequent proposed SIP revision by New York, EPA again took approximately three years to reach a decision. In

CCO v. Thomas, the court reiterated its concern that the EPA was not honoring its time-sensitive, statutory mandate. As a remedy for EPA's delay, the Court recommended "[a]n enforcement action [against EPA] in district court under section 7604(a)(2)." *CCO v. Thomas*, 799 F.2d at 888. As discussed above, this is not a realistic solution.

In *Duquesne Light v. EPA*, 698 F.2d 456, the D.C. Circuit was petitioned by over a dozen entities to review final EPA regulations dealing with non-compliance penalties provided for by section 120 of the Act (42 U.S.C. § 7420). Petitioners objected to an EPA regulation (40 C.F.R. § 66.3(c)(1)) which allows penalty assessments against a major source in violation of existing SIP requirements, despite the pendency of a proposed SIP revision before the EPA for approval. The D.C. Circuit's solution to this quandary was to suggest that once the statutory deadline for acting on a SIP revision passes, the non-compliance penalty should be held in abeyance until EPA's final action on the SIP. "Should EPA ultimately reject the SIP, the penalty should be calculated back to the deadline, with interest." *Duquesne Light*, 698 F.2d at 472.[14] The court then remanded EPA's regulation (40 C.F.R. § 66.3(c)(1)) back to the Agency and directed that a new regulation be developed which incorporated the court's determination. A review of 40 C.F.R. § 66.3 indicates that, to date, the EPA has still not reissued the regulation, as directed by the Circuit Court.

A. THE RULE IN THE FIFTH CIRCUIT IS CONSISTENT WITH LEGISLATIVE INTENT.

Because the statutory framework requires EPA to approve SIP revisions or DCOs before they can become part of the federally-enforceable SIP, there is necessarily a lag in time between a State's adoption of a revision and EPA's review and approval of it. It is also apparent that during this period of federal review, a source is often unable to comply

---

[14] The Court also observed that the initiation of an action under § 7604(a)(2), as suggested by the Second Circuit in *CCO v. Thomas*, 799 F.2d at 888, does not safeguard the rights of the source.

with both the existing SIP requirements and the new obligations adopted by the State but not yet approved by EPA.

American Cyanamid was confronted by such a dilemma when it was under an obligation to install air pollution control equipment on "floating roof" tanks in order to comply with the "old" SIP but had the opportunity to achieve the same quantitative emission reductions under a revision to the SIP. In the Fifth Circuit case of *American Cyanamid v. EPA*, 810 F.2d 493, EPA was requested by the State of Louisiana, pursuant to § 7410 of the Act, to approve revision of the SIP to reflect this change in the State's regulatory strategy. Over two years later, EPA sent American Cyanamid, the source subject to the SIP revision, a Notice of Non-compliance under § 7420 of the Act. At the time the Notice was sent, indeed even two years later at the time of the court's ruling, EPA had not acted on the Louisiana SIP revision. The court determined that when a proposed SIP revision has been pending for more than four months, EPA may collect penalties only for violations which occur after the EPA finally rejects the proposed SIP revision. *Id.* at 500. While the *American Cyanamid* case was brought under § 7420 of the Act, instead of under § 7413 as in the present case, the court's reasoning is fully applicable in both contexts, as the Fifth Circuit later declared.

The Fifth Circuit recently reviewed the circumstances of EPA's failure to act upon a DCO within the 90 days provided by statute. In *General Motors v. EPA*, 871 F.2d 495, the State of Texas issued a DCO to General Motors and submitted it to EPA for approval. Prior to acting to approve or disapprove the DCO and after it had expired by its own terms, EPA issued a Notice of Violation to General Motors. The Court reviewed the rationale underlying its decision in *American Cyanamid* and found that it was equally applicable in the *General Motors* case, remarking, "[t]he § 7413(d) deadline applicable to delayed compliance orders is no less important than the § 7410 deadline governing revision to state plans." *General Motors v. EPA*, 871 F.2d at 498. Consistent with the holding in *American Cyanamid*, the Fifth Circuit held EPA must forfeit its power to collect penalties between the end of the 90-day

period for EPA action and the expiration date of the DCO if EPA had still not acted when the DCO expired.

The rule in the Fifth Circuit effectuates Congressional intent. It provides incentives for EPA to act within the allotted time by eliminating EPA's ability to seek penalties from a source until EPA acts to approve or disapprove the revision. It limits the period of time during which a source is uncertain as to appropriate conduct. It deters needless litigation and its concomitant expense to sources and the taxpayers.

Even the Fifth Circuit's rule does not entirely eliminate the harsh problems confronting sources as a result of EPA delay. A source is still subject to penalties after the EPA's ultimate decision, and the source risks that even slavish compliance with the terms of a proposed SIP revision or DCO may ultimately result in non-compliance with the State's SIP if EPA eventually disapproves. For example, a State may adopt a SIP revision calling for installation of a particular type of control by a date certain, *e.g.*, two years hence, with increments of progress to be met along the way. A subject source may thereafter expend millions of dollars installing appropriate air pollution control technology, in full compliance with the defined progress milestones, successfully achieving compliance by the date certain. Then, perhaps months later, the source may again become at risk if EPA disapproves the proposed revision because the source is not in compliance with the existing SIP. While the Fifth Circuit rule has these burdensome shortcomings, it is the one which most closely effectuates Congressional intent. Clearly, the EPA's timely fulfillment of its responsibilities best adheres to that intent and its underlying rationale.

B. THE RULES IN THE D.C., FIRST AND SIXTH CIRCUITS ARE BASED UPON ERRONEOUS ASSUMPTIONS.

The final line of cases dealing with the failure of EPA to timely fulfill its obligations includes the First Circuit's *General Motors* case at bench and the Sixth Circuit's decision in *United States v. Alcan Foil Products*, 889 F.2d 1513, relying upon the First Circuit's view. In *U.S. v. General Motors*, 876

F.2d 1060, the First Circuit addressed the consequences resulting from EPA's failure to honor its statutory obligation. The court adopted a rule which places responsibility upon the trial court to take the Agency's delay and any resultant prejudice to the source into consideration when determining the appropriate amount of penalties to assess. The court indicated a belief that this possible reduction in penalties would provide EPA sufficient incentive to timely act.[15]

Finally, the Sixth Circuit's decision in *Alcan Foil Products* reviewed the D.C., Fifth and First Circuit approaches. Observing that "the public should not suffer because of EPA's failures," the Sixth Circuit adopted the First Circuit's rule that the amount of civil penalties in an enforcement action may be adjusted to take into account any prejudice to the source caused by EPA delay.[16] *United States v. Alcan Foil Products*, 889 F.2d ___.

The *Duquesne Light* and *General Motors* lines of decisions are predicated on erroneous assumptions. Each case expresses the concern that the "public not be injured" through impediment to EPA enforcement of an old SIP provision while a revision is pending.[17] While concern for the public

---

[15] It seems unworthy, almost venial, that incentives for prompt EPA action on SIP submissions should relate so overwhelmingly to the quantity of penalties EPA can collect. Congressional mandates and the broader policy impacts of delay are more appropriate incentives.

[16] As with the D.C. Circuit in *Duquesne Light*, the First Circuit and the Sixth Circuit failed to take into account the States' primary responsibility for enforcement, as well as the fact SIP revisions are enforceable under State Law even before approval by the EPA.

[17] These concerns are apparently not shared by the EPA. In a memorandum to Regional Air Management Directors, Sheldon Meyers, Director of EPA's Office of Air Quality Planning and Standards, suggested the States be discouraged from submitting a SIP revision where the delay sought to be accomplished by the revision will be less than the time required for EPA to process the State's proposal. Since it often takes three or more years for EPA to issue a decision, presumably EPA is not interested in seeing SIP revisions, such as that issued to GM in the case at bench, where the pollution ceases before EPA acts upon the proposal. *See* "Source Specific SIP Revisions", July 29, 1983, *reprinted in* EPA Clean Air Act Compliance/Enforcement Guidance Manual, *supra* at 223-24.

welfare is always appropriate, the opinions have ignored the legitimate expectations of the regulated community that EPA will comply with the terms of the Act and deal fairly with the regulated community and the States. The opinions of the courts in these cases also expose a serious flaw in analysis: the assumption that regulated sources will be uncontrolled or unregulated if EPA is precluded from enforcing the existing SIP.

As is apparent from the language of the Act itself, as well as decisions of this Court interpreting the Act, the States have *primary* responsibility for development and enforcement of the regulations comprising the SIPs. The EPA's enforcement role is *secondary*. *Train*, 421 U.S. at 78-79. Once a State adopts a SIP revision, it has the ability to enforce that regulation under State law, even absent approval of the EPA. In view of this and the State's primary responsibility for air pollution control, the public faces no risk because there would be no unregulated sources of air pollution even during EPA's extended review.

Perhaps even more distressing than the EPA's jaundiced view is its apparent acceptance in at least some of the recent judicial opinions addressing the issue. For example, in the First Circuit's decision in the case at bench, the Court characterizes the states' motivation in these circumstances as "the states' interests in protecting its [sic] local industry." 876 F.2d at 1067. The Court further characterizes the "states' interests" as being in opposition to "the public's." *Id.* at 1068. That characterization is particularly ironic given the success of Massachusetts in bringing GM's facility into an environmentally superior operation.

The pejorative and oversimplified view inherent in such a statement wholly disregards the tremendous labors exerted by the States, as well as regional and local government units, to advance the cause of environmental protection. If the States give some consideration to the economic welfare of their citizens and businesses, while trying to achieve environmental goals, that is their right and duty, as this Court firmly recognized in the *Train* and *Union Electric* decisions. But to

recognize the States' power to balance these competing interests is not to reduce them to the level of apologists for pollution. Certainly the thousands of individuals and regulated sources daily striving to comply with state law environmental requirements, and to cope with the strong enforcement tools of the states – including monetary penalties, judicial injunctions, administrative variance and abatement orders, and even criminal sanctions including imprisonment, would not agree with the characterization suggested by the First Circuit.

Underlying this judicial depreciation of the role and motives of the States is an apparent misconception of the enforceability of State environmental law. It should be clear, but apparently it is not, that SIP provisions adopted by a State are in force and enforceable under State law, regardless of whether they are approved by the EPA. "Perhaps the most important thing to recognize about state environmental law is its independence of federal authority. . . .[S]tate environmental law is not simply a vestige operating with respect to federal environmental law. Nor does state law operate solely to 'fill in the blanks' set out in federal law. Rather, state law ordinarily sets out a full program of regulation that may include not only those elements needed for federal 'authorization', but also numerous additional elements. . . ." Novick *et al.*, *Law of Environmental Protection*, § 6.01 at 6-3, 6-4 (1987). The concurring opinion in *Alcan Foil Products* plainly does not understand this, as it refers to a "proposed revised SIP" as having "no legal efficacy whatever." The lawyer who would advise his or her client that a new regulation, DCO, or variance adopted by state air pollution authorities has "no legal efficacy whatever" would be risking serious malpractice liability.

California law is illustrative on this point. The California Legislature delegated primary authority for developing components of the SIP to the local air pollution control districts ("APCDs") within the State. Cal. Health & Safety Code § 41650(a). The APCDs are to adopt rules and regulations to execute their powers and duties. Cal. Health & Safety Code § 40702. Determination of the APCDs as to the proper air

pollution control measures within their individual jurisdictions is conclusive unless the State Air Resources Board ("ARB") determines otherwise after a public hearing. Cal. Health & Safety Code §§ 41650-41652. The ARB is the air pollution control agency for all purposes set forth in federal law. Cal. Health & Safety Code § 39602. The ARB has the responsibility for SIP submissions to EPA. 42 U.S.C. § 7407(a).

The violation of the rules and regulations of an APCD may be punished either criminally (Cal. Health & Safety Code § 42400) or by civil penalties of up to $25,000 per day (Cal. Health & Safety Code §§ 42400.1-42403). Obviously, a source faces substantial state law sanctions for failing to adhere to the requirements of local rules and regulations, whether or not EPA has yet acted to approve them as part of the SIP.

Also overlooked is the encouragement of litigation, and the resultant additional burdens upon the federal courts, if the approaches of the D.C., First, Second, or Sixth Circuits are the adopted norm. Plainly, it makes little sense to condone initiation of enforcement litigation against sources attempting to comply with new State regulations while an EPA decision upon proposed revisions is overdue. If EPA is permitted to initiate such actions, it has no incentive to issue a final determination upon pending State revisions until after the enforcement action is concluded, if then. EPA is able to usurp the States' primary role solely by ignoring its own mandate to act. Similarly, the cases demonstrate that the initiation of an action against the Administrator under § 7604 fails to incite timely conduct on the part of EPA. This merely creates another pointless item of litigation in the federal courts without providing any guidance to the regulated community as to appropriate conduct.

The First Circuit approach also tends to rewrite the Act. The court is effectively saying that the failure to meet the statutory deadline only matters if "prejudice" can be shown to the source, but not otherwise. This is a dangerous approach to enforcement of statutory deadlines, reading an escape clause

where Congress has not seen fit to provide one. While "prejudice" may not be demonstrable to an individual source, the State's whole regulatory approach may be harmed by EPA delay, yet the First Circuit rule fails to take this into account.

Finally, "adjustment" of penalties, in order to take into account the "prejudice" suffered by a source due to EPA inaction, is an illusory sanction. A "penalty adjustment" obviously does not prohibit the initiation of an enforcement action. In fact, § 7413(b) *requires* the initiation of an action against the operator of a major source where the source remains "in violation" of a SIP thirty days after being provided a Notice of Violation as provided by § 7413(a)(1). An action may be initiated against the operator of a minor source under these same circumstances. Thus, the mere issuance of a Notice of Violation of an old SIP requirement, during the pendency of a SIP revision, has significant consequences. Sources are pushed down the slippery slope, inexorably becoming subject to the not inconsiderable expense of litigating an enforcement action with the federal government. Even assuming that at the conclusion of such litigation a court determined the prejudice suffered by a source from EPA's delay was so great as to negate any award of civil penalties, the source would necessarily have incurred substantial defense costs and even public obloquy.

Settlement of civil penalties actions under these circumstances will likely be more complex and difficult than ever. The EPA has published a civil penalty policy which provides the strictures within which EPA and Justice Department personnel must operate in settlement discussions. The EPA has a similar policy for calculation of § 120 noncompliance penalties.[18] These policies drastically limit the flexibility of the

---

[18] *See, e.g.*, "Clean Air Act Stationary Source Civil Penalty Policy," September 12, 1984, and "Settlement of Noncompliance Penalties Under Section 120 of The Clean Air Act," October 30, 1980, and April 2, 1981, *reprinted in* – EPA Clean Air Act Compliance/Enforcement Guidance Manual, *supra* at 537-594, 639-641, 656-62. The application of these

(Continued on following page)

government to negotiate settlement dollar amounts in enforcement actions initiated under §§ 7413 and 7420 of the Act.

1. The approach of the First and Sixth Circuits ignores the practicalities of air pollution control compliance under the Congressional scheme.

Consistent with the primary role of the States and local government in control of air pollution, the day to day regulation of sources is performed by State and local authorities. A source's understanding of its obligations and timetables for compliance is largely, if not entirely, derived from those authorities. Contact with EPA officials is rare; EPA's activities under the Act are almost always in the background. This is all entirely consistent with the intent of Congress and the statutory scheme of the Act. "[T]he majority of lawyers working on environmental problems – either on a regular or an occasional basis – deal in most instances with state law and local regulations, rather than with federal law and agencies. In part this is because the underlying federal statutes are largely implemented at the state level. . . ." Selmi and Manaster, *supra*, §1.01 at 1-1.

Day in and day out, air pollution sources – private individuals, small businesses, large corporations, municipalities, even the federal Government's own installations which pollute – are trying to comply with the air pollution requirements

---

(Continued from previous page)

penalty policies is so restricting that once an action is initiated, the government cannot dismiss the action without the defendant's payment of the minimum amount determined by performing the penalty calculation. Hence, even if a source could ultimately convince EPA personnel of extreme prejudice, the penalty policy does not permit the action to be dismissed without payment. The addition of a new "prejudice" factor into this penalty policy settlement mix will only further inhibit the ability of prosecutor and defendant to come to a meeting of the minds as to a settlement. Even if some resolution could be reached, the amount of government effort expended could well exceed the effort that would have been required to reach a timely decision on a SIP proposal in the first place.

of the States. Members of the public, as individuals and in organized environmental groups, regularly testify, lobby, petition, and otherwise participate in the regulatory efforts of state-level environmental agencies. Certainly the public is served by these regulatory efforts. It is myopic in the extreme – looking hardly beyond the banks of the Potomac – to believe that the States' interests do not serve the public and do not serve environmental protection. Such a perspective does not correspond with reality. Nor does it correspond with the allocation of power Congress embodied in the Clean Air Act.

2. The practical results of the approaches taken by the various Circuits can be clearly contrasted.

As this graphic comparison demonstrates, only the Fifth Circuit rule provides an approach which is consistent with statutory intent.

	Fifth Circuit	DC Circuit	First & Sixth Circuits
1.	Exposure to penalties only during statutory review period and if review takes longer, exposed to penalties only after EPA decides.	Exposure to penalties for the entire period EPA takes to review SIP proposal.	Exposure to penalties for the entire period EPA takes to review SIP proposal but allows mitigation based upon "prejudice" to source.
2.	Provides high degree of incentive for EPA to timely decide.	Provides no incentive for EPA to timely decide.	Provides limited incentive for EPA to timely decide.
3.	Reduces incentive for initiation of actions before EPA decides on SIP revision.	Enhances likelihood of initiation of EPA actions even before EPA decides on SIP revision.	Enhances likelihood of initiation of EPA actions even before EPA decides on SIP revision.

4.	Assumes states have primary SIP enforcement responsibility.	Assumes federal government has primary SIP enforcement responsibility.	Assumes federal government has primary SIP enforcement responsibility.
5.	Provides disincentive for EPA to attempt "pocket veto" of state regulation.	Allows EPA a "pocket veto" of state regulation.	Allows EPA a "pocket veto" of state regulation.

IV.

CONCLUSION

The arguments in this case, and the pertinent decisions of the Circuit Courts of Appeals, present competing interpretations of rather technical provisions of the Clean Air Act. The discourse tends to become highly legalistic in nature, focusing upon the terms of the Act as a discrete object of study. But this case is neither an academic exercise nor a theoretical exploration of the concept of federalism. This case reflects the tremendous practical difficulties the Nation faces in cleaning up the air we breathe, while at the same time preserving the fundamental fairness of our legal system, the day-to-day integrity of a system of shared federal-state governmental power, and the ability of individuals and companies to engage in business for the economic health and welfare of the Nation without unpredictable regulatory obstacles and even retroactive penalties being cast in their way.

Petitioner and *amici* have tried to illuminate the need for this Court to firmly enforce the statutory deadlines Congress established in the Clean Air Act. In a broad sense it is only fair that the federal Government be required to abide by the deadlines Congress has imposed under the Act, just as must the States and just as must business entities regulated under both that Act and state environmental legislation. It is difficult to imagine the coherent operation of a legal system which accepts the rationalizations offered by EPA for the pattern of delay at issue here. Obviously deadlines and procedural niceties are not always convenient. In the *Hallstrom* decision,

this Court rightly insisted upon enforcing Congressionally chosen procedural prerequisites. The Court did not disregard the statutory prerequisite to initiation of an action simply because the citizen's zeal to litigate in the interest of environmental protection would arguably promote the public good. Similarly, EPA's zeal to initiate enforcement litigation does not justify judicial disregard of the procedural deadlines Congress has written into the Act.

These statutory deadlines are not just optional frills and extras included by the Legislative Branch to make sure federal bureaucrats keep busy. They reflect the real sharing of power and responsibilities between the States and the federal Government which Congress built into the Act. The Act can only operate fairly, effectively, and efficiently if *all* participants – the States, the federal Government, regulated sources, and citizens – are required to play by the defined rules. Ironically, the EPA's position in this case is an attempt to rationalize for itself a broad disregard for the timetables imposed by Congress upon the federal Government itself and to claim the unbridled right to enjoy unlimited delay in reviewing the States' allowances of specific, time-limited delays for regulated businesses. EPA'S overriding concern appears to be maintenance of total freedom to seek monetary penalties at any time, even from sources whose compliance problems are solved and who are covered by pending and unanswered SIP revisions.

It is obviously most desirable for the Court to resolve a dispute of this sort on the basis of clear statutory language. But as all parties appear to agree, this is a case in which Congress has not spoken clearly on the appropriate remedy for the EPA's failure to adhere to the statutory deadlines. It thus falls to the Court to implement the remedy which best corresponds with the language, structure, and purposes of the Act.

Amici have shown it is the Fifth Circuit position which comports most closely with the Act and which will most fairly and effectively honor the Congressionally prescribed rights and needs of all participants in the statutory process. If EPA is prevented from seeking penalties during the period of its

extra-statutory delay, the States will have the fullest opportunities to effect and enforce their chosen and evolving mix of control strategies. Regulated sources and members of the public will know with much greater certainty just what compliance conduct is required at any given time. The EPA will retain the right to issue its decisions whenever it wishes and thereafter to pursue prospectively any appropriate penalties for continuing violations.

Respectfully submitted,

LAWRENCE J. STRAW, JR.
(Counsel of Record)

KENNETH A. MANASTER
STRAW & GILMARTIN
A PROFESSIONAL LAW CORPORATION
100 Wilshire Boulevard, Suite 1325
Santa Monica, California 90401
Telephone: (213) 395-5577

Counsel for Amici Curiae
Golden West Refining Company,
Environmental Audit, Inc., and
Security Environmental Systems, Inc.

January 18, 1990